

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MARC RUSSELL TRUSTY,

Petitioner,

v.

WARDEN RENEE BAKER, et al.,

Respondents.

Case No. 3:13-cv-00034-MMD-WGC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Pending before the Court is respondents' motion to dismiss. (Dkt. no. 13.)

I. PROCEDURAL HISTORY

On January 14, 2009, the State of Nevada charged petitioner by way of criminal indictment with four counts of robbery with the use of a firearm. (Exhibit 2.)¹ Petitioner elected to plead guilty to three of the four robbery counts, and the State agreed to dismiss the pending criminal charges in four other cases. (Exhibit 18.) On July 22, 2009, the state district court entered a judgment of conviction sentencing petitioner to three consecutive terms of imprisonment of 30 to 75 months on each of the three counts, with

¹The exhibits referenced in this order are found in the Court's record at dkt. nos. 14-18.

1 an additional three equal and consecutive terms of imprisonment for the use of a deadly
2 weapon. (Exhibit 22.)

3 Petitioner appealed his convictions to the Nevada Supreme Court. (Exhibit 23.) In
4 his direct appeal brief (fast track statement), he raised two claims: (1) the district court
5 abused its discretion by sentencing petitioner to consecutive prison terms; and (2) the
6 district court failed to adequately canvass petitioner concerning the maximum
7 punishment he could receive under the plea deal. (Exhibit 37.) On January 7, 2010, the
8 Nevada Supreme Court affirmed petitioner's convictions. (Exhibit 39.) In its order of
9 affirmance, the Nevada Supreme Court expressly declined to consider petitioner's claim
10 concerning the adequacy of the district court's plea canvass because he had not
11 previously raised the claim and the alleged error did not clearly appear on record.
12 (Exhibit 39, at p. 2.)

13 On August 9, 2010, petitioner filed a post-conviction habeas petition in the state
14 district court. (Exhibit 51.) The state district court dismissed a number of petitioner's
15 claims by order filed April 1, 2011. (Exhibit 61.) The state district court conducted an
16 evidentiary hearing on the remaining claims. (Exhibits 79 & 83.) The state district court
17 denied the petition by written order filed April 3, 2012. (Exhibit 93.)

18 Petitioner appealed the denial of his post-conviction state habeas petition.
19 (Exhibit 85.) In his appellate brief (fast track statement), petitioner raised the following
20 claims: (1) the use of news footage in identifying petitioner violated his due process
21 rights; (2) trial counsel was ineffective for failing to challenge the identification of
22 petitioner through pretrial motion practice; (3) trial counsel was ineffective for failing to
23 stop the plea hearing when petitioner incorrectly states the maximum sentences; and
24 (4) trial counsel was ineffective at sentencing for failing to object to the State's reference
25 to unrelated crimes. (Exhibit 104.) On December 2, 2012, the Nevada Supreme Court
26 affirmed the denial of petitioner's state habeas petition. (Exhibit 108.)

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Petitioner dispatched his federal habeas corpus petition to this Court on January 17, 2013. (Dkt. no. 6, at p. 1.) In the federal petition, petitioner raises the following claims:

Claim 1: Trial counsel was ineffective for failing to investigate an alibi witness or otherwise pursue a false identification defense.

Claim 2: The district court failed to adequately canvass petitioner concerning the maximum punishment he could receive under the plea deal in violation of NRS 174.035 and petitioner's constitutional rights.

Claim 3: The State failed to turn over discovery material, including surveillance video and witness interview transcripts, in violation of petitioner's constitutional rights.

(Dkt. no. 6.) Respondents filed the instant motion to dismiss the petition. (Dkt. no. 13.) Petitioner filed an opposition. (Dkt. no. 22.) Respondents filed a reply brief. (Dkt. no. 23.)

II. DISCUSSION

A. Exhaustion

A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

A habeas petitioner must "present the state courts with the same claim he urges upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). To satisfy exhaustion, each of petitioner's claims must have been previously presented to the Nevada Supreme Court, with references to a specific constitutional guarantee, as well as a statement of facts that entitle petitioner to relief. *Koerner v. Grigas*, 328 F.3d 1039,

1 1046 (9th Cir. 2002). The federal constitutional implications of a claim, not just issues of
2 state law, must have been raised in the state court to achieve exhaustion. *Ybarra v.*
3 *Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (*citing Picard*, 404 U.S. at 276)). To
4 achieve exhaustion, the state court must be “alerted to the fact that the prisoner [is]
5 asserting claims under the United States Constitution” and given the opportunity to
6 correct alleged violations of the prisoner’s federal rights. *Duncan v. Henry*, 513 U.S.
7 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well
8 settled that 28 U.S.C. § 2254(b) “provides a simple and clear instruction to potential
9 litigants: before you bring any claims to federal court, be sure that you first have taken
10 each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (*quoting*
11 *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).

12 A claim is not exhausted unless the petitioner has presented to the state court
13 the same operative facts and legal theory upon which his federal habeas claim is based.
14 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
15 exhaustion requirement is not met when the petitioner presents to the federal court facts
16 or evidence which place the claim in a significantly different posture than it was in the
17 state courts, or where different facts are presented at the federal level to support the
18 same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*
19 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458
20 (D. Nev. 1984).

21 In Ground 3 of the federal petition, petitioner asserts that the State failed to turn
22 over discovery material, including surveillance video footage and witness interview
23 transcripts, in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). (Dkt. no. 6, at p.
24 7.) Petitioner raised a similar claim in his *pro per* post-conviction habeas petition filed in
25 state district court. (Exhibit 51, at p. 11.) However, the claim was not presented to the
26 Nevada Supreme Court in petitioner’s appellate brief (fast track statement). (Exhibit
27 104.) Ground 3 of the federal petition has never been presented to Nevada’s highest
28 court and therefore the claim is unexhausted. *See Castillo v. McFadden*, 399 F.3d 993,

1 1000 (9th Cir. 2005) (noting that the state high court “was not required to review the
2 parties’ trial court pleadings,” and that the petitioner must have presented his federal
3 claims “within the four corners of his appellate briefing” in order to properly exhaust the
4 claims).

5 **B. Procedural Default**

6 In Ground 2 of the federal petition, petitioner asserts that the state district court
7 failed to adequately canvass him concerning the maximum punishment he could receive
8 under the plea agreement. (Dkt. no. 6, at p. 5.) Respondents contend that Ground 2 of
9 the federal petition is procedurally barred.

10 “Procedural default” refers to the situation where a petitioner in fact presented a
11 claim to the state courts but the state courts disposed of the claim on procedural
12 grounds, instead of on the merits. A federal court will not review a claim for habeas
13 corpus relief if the decision of the state court regarding that claim rested on a state law
14 ground that is independent of the federal question and adequate to support the
15 judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The *Coleman* Court
16 stated the effect of a procedural default, as follows:

17 In all cases in which a state prisoner has defaulted his federal claims in
18 state court pursuant to an independent and adequate state procedural
19 rule, federal habeas review of the claims is barred unless the prisoner can
20 demonstrate cause for the default and actual prejudice as a result of the
alleged violation of federal law, or demonstrate that failure to consider the
claims will result in a fundamental miscarriage of justice.

21 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The
22 procedural default doctrine ensures that the state’s interest in correcting its own
23 mistakes is respected in all federal habeas cases. *See Koerner v. Grigas*, 328 F.3d
24 1039, 1046 (9th Cir. 2003). To demonstrate cause for a procedural default, the petitioner
25 must be able to “show that some *objective factor external to the defense* impeded” his
26 efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis
27 added). For cause to exist, the external impediment must have prevented the petitioner
28 from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

Ground 2 of the federal petition asserts that the state district court failed to adequately canvass petitioner concerning the maximum punishment he could receive under the plea agreement. (Dkt. no. 6, at p. 5.) Petitioner raised a similar claim on direct appeal. (Exhibit 37, at pp. 4-5.) The Nevada Supreme Court declined to consider the claim because petitioner raised the claim in a procedurally deficient manner. (Exhibit 39, at p. 2.) In declining to consider the claim, the Nevada Supreme Court ruled: “Trusty does not claim that he previously raised a challenge to the validity of his plea in the district court and the alleged error does not clearly appear on the record, therefore we decline to consider his contention.” (Exhibit 39, at p. 2) (*citing Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)). The Nevada Supreme Court’s refusal to consider petitioner’s claim rested on a state law procedural ground that is independent of the federal question and adequate to support the judgment. *See Coleman v. Thompson*, 501 U.S. at 730-31. Petitioner has failed to demonstrate cause and prejudice to excuse the procedural default. Ground 2 of the petition was procedurally defaulted in state court, therefore, the claim is barred from review by this Court.

C. Tollett Bar

In *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), the United States Supreme Court held that “when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” Instead, [h]e may only attack the voluntary and intelligent character of the guilty plea” *Id.*; *see also Menna v. New York*, 423 U.S. 61, 63, n.2 (1975) (discussing purpose and scope of *Tollett* bar). The Ninth Circuit has applied the *Tollett* rule to both independent constitutional claims and claims of ineffective assistance of counsel. *See United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (per curiam) (holding that defendant’s pre-plea ineffective assistance of counsel claim, and underlying speedy trial claim, were barred by *Tollett*; *see also United States v. Jackson*, F.3d 1141, 1144 (9th Cir. 2012) (citing *Tollett* and *Bohn* with approval).

1 Ground 1 of the federal petition asserts that counsel was ineffective for failing to
2 investigate and pursue a potential defense. (Dkt. no. 6, at p. 3.) Ground 3 of the federal
3 petition asserts that the State failed to turn over discovery material. (Dkt. no. 6, at p. 7.)
4 Under *Tollett*, petitioner cannot raise Grounds 1 and 3 of the federal petition, which are
5 independent constitutional claims of events that occurred prior to entry of the guilty plea.
6 Because petitioner seeks to collaterally attack his factual guilt in Grounds 1 and 3, but
7 has already admitted that guilt through the plea agreement, *Tollett* bars consideration of
8 those claims in his federal habeas corpus proceeding.

9 **III. CERTIFICATE OF APPEALABILITY**

10 In order to proceed with any appeal, petitioner must receive a certificate of
11 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
12 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236
13 F.3d 550, 551-52 (9th Cir. 2001). District courts are required to rule on the certificate of
14 appealability in the order disposing of a proceeding adversely to the petitioner or
15 movant, rather than waiting for a notice of appeal and request for certificate of
16 appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255
17 Cases. Generally, a petitioner must make “a substantial showing of the denial of a
18 constitutional right” to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2);
19 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that
20 reasonable jurists would find the district court’s assessment of the constitutional claims
21 debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
22 inquiry, the petitioner has the burden of demonstrating that the issues are debatable
23 among jurists of reason; that a court could resolve the issues differently; or that the
24 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,
25 no reasonable jurist would find this Court’s dismissal of the petition debatable or wrong.
26 The Court therefore denies petitioner a certificate of appealability.

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1 **IV. CONCLUSION**


2 It is therefore ordered that respondents' motion to dismiss (dkt. no. 13) is
3 granted.

4 It is further ordered that the petition is dismissed with prejudice.

5 It is further ordered that petitioner is denied a certificate of appealability.

6 It is further ordered that the Clerk shall enter judgment accordingly.

7 DATED THIS 18th day of November 2013.

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11 MIRANDA M. DU
12 UNITED STATES DISTRICT JUDGE
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